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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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HENRY LEE FOGGY,

Case No. 3:12-cv-00672-MMD-VPC

Petitioner,

ORDER

v.

ISIDRO BACA, Warden,

Respondent.

Petitioner Henry Foggy's second and successive petition was dismissed without prejudice on those bases. (Dkt. no. 5.) Petitioner has appealed the denial of his motion to reconsider. (Dkt. no. 11.) The Ninth Circuit Court of Appeals has indicated that the appeal will not proceed until this Court "and, if necessary," the appellate court decides to issue a certificate of appealability. (Dkt. no. 15.)

Generally, a petitioner seeking to appeal the district court's decision in a habeas action must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(1). In an instance, such as this, where the petition was dismissed on procedural grounds, the Court must consider not only the viability of the claims presented in the petition, *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000), quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), but also whether the district court's procedural decision was debatable by jurists of reason. *Id.*

The Court has considered the issues raised by petitioner with respect to whether they satisfy the standard for issuance of a certificate of appeal. The Court determines that while petitioner has “facially alleged the denial of a constitutional right,” the Court’s procedural ruling was not debatable by reasonable jurists, particularly where the dismissal was without prejudice to seeking leave of the Ninth Circuit to bring the petition pursuant to 28 U.S.C. § 2244(a)(b)(3). Accordingly, the Court will deny petitioner a certificate of appealability.

IT IS THEREFORE ORDERED that petitioner is DENIED A CERTIFICATE OF APPEALABILITY.

DATED this 5<sup>th</sup> day of August 2013.



MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE